

SERIOUS ORGANISED CRIME AND POLICE ACT 2005

EXPLANATORY NOTES

THE ACT

Commentary on Sections

Part 2: Investigations, prosecutions, proceedings and proceeds of crime

Chapter 1: Investigatory powers of DPP etc.

162. The Director of the SFO (as well as a number of regulatory bodies and the Asset Recovery Agency and in Scotland the Lord Advocate in cases of serious and complex fraud) has the power to compel individuals to co-operate with investigations by producing documents and answering questions. This Chapter provides similar powers for the police, SOCA and HM Revenue and Customs investigations in relation to organised crime, terrorist or certain revenue offences. The powers will only be exercisable by the Director of Public Prosecutions (DPP) or the Director of Revenue and Customs Prosecutions (or prosecutors with delegated authority) or, in Scotland, the Lord Advocate and will not apply to professionally privileged material. Statements made by persons in compliance with a requirement under this Chapter cannot be used in evidence against them, except in very limited circumstances.

Sections 60-63: Investigatory powers of DPP etc.; Offences to which this Chapter applies; Disclosure notices; Production of documents

163. These sections provide that the DPP, the Director of Revenue and Customs Prosecutions and the Lord Advocate (or a prosecutor with delegated authority) can issue a disclosure notice. The sections restrict disclosure notices and the power to enter and seize documents (section 66) to investigations into offences involving: drug trafficking, money laundering, directing terrorism, people trafficking, arms trafficking, counterfeiting, intellectual property theft, pimps and brothels, blackmail, terrorist funding and certain tax and excise fraud offences (section 61). *Subsections (2) and (3)* of section 61 exclude certain offences where amounts less than £5,000 are involved. *Subsections (4) and (5)* of the section confer on the Home Secretary and Scottish Ministers the power to amend this list of offences (or the £5,000 threshold) by order subject to the affirmative resolution procedure. The prosecutor will be able to issue a disclosure notice if there are reasonable grounds for believing that the recipient of the notice can provide information of substantial value to the investigation of any of these offences (section 62(1)). The disclosure notice would be a written notice signed by the prosecutor setting out the requirements on the recipient to answer questions, produce documents or otherwise provide information, as well as where, when and how these requirements should be met (section 62(3) and (4)). The notice can be given to its recipient by a police constable, designated member of staff of SOCA or officer of HM Revenue and Customs (section 62(2)), who will be able to take copies or extracts from

the specified documents or require the recipient to explain the documents or where any unavailable documents are (section 63).

Section 64: Restrictions on requiring information etc.

164. This section excludes the following material from the provisions in this Chapter:
- material subject to legal professional privilege (confidential communications between a professional legal adviser and their client relating to legal advice or proceedings);
 - confidential personal records relating to any business or profession;
 - confidential journalistic material; and
 - confidential banking information - unless the person to whom the obligation of confidence is owed consents to the disclosure or the prosecutor specifically authorises the requirement to be made.

Section 65: Restrictions on use of statements

165. This section provides that a statement made by a person in response to a requirement imposed under this Chapter cannot be used in evidence in criminal proceedings against them, other than proceedings for an offence under section 67 or for an offence of giving a false statutory declaration or statement. The only exception is where the person seeks in other criminal proceedings to use another statement which is inconsistent with the statement made in response to the requirement under this Chapter.

Section 66: Power to enter and seize documents

166. This section provides for a magistrate, or sheriff in Scotland, to issue a warrant to enter and seize documents where someone has failed to provide documents specified in a disclosure notice or it is not practicable to give a disclosure notice or doing so might seriously prejudice an investigation. The warrant would authorise a constable, a member of SOCA's staff or an officer of HMRC to enter, using force if necessary, and search the premises and seize and retain any specified documents. The constable or other person authorised by the warrant may take other people with him on the search, but must show the warrant to the occupier of the premises on request.

Section 67: Offences in connection with disclosure notices or search warrants

167. This section creates new summary offences of failing to comply with a disclosure notice and of obstructing a person in the exercise of a warrant under section 66. The maximum penalty is a level 5 fine (currently £5,000) or a term of imprisonment of 51 weeks (in Scotland, 12 months), or both. The section also creates an offence of making a false or misleading statement which if tried on indictment is punishable by a fine or up to 2 years imprisonment, or both.

Section 68: Procedure applicable to search warrants

168. This section amends Part 1 of Schedule 1 to the Criminal Justice and Police Act 2001 so as to secure that where it is not practicable to determine on the premises being searched whether a document can be seized or to separate it from other material, the material can be seized and removed.

Section 69: Manner in which disclosure notice may be given

169. This section provides that a disclosure notice may be given to a person by delivering it to him, leaving it at his proper address or sending it by post to him at that address. The definition of a person's "proper address" is his usual or last-known address. This section does not apply to Scotland.

Section 70: Interpretation

170. This section defines terms used in Chapter 1 of Part 2.

Chapter 2: Offenders assisting investigations and prosecutions

171. This chapter creates a statutory framework to clarify and strengthen the current common law provisions that provide for immunity and sentence reductions for defendants who co-operate in the investigation and prosecution of their criminal colleagues.

Section 71: Assistance by offender: immunity from prosecution

172. This section provides for a designated prosecutor from the Crown Prosecution Service, the Revenue and Customs Prosecutions Office, the Serious Fraud Office or the Northern Ireland Director of Public Prosecutions office to grant a person a conditional immunity from prosecution. The immunity notice itself must be written and specify the offences for which the person will be immune from prosecution in England and Wales or Northern Ireland. The notice will normally include conditions, breach of which would lead to the immunity being revoked.

Section 72: Assistance by offender: undertakings as to use of evidence

173. This section provides for a designated prosecutor (as specified in *subsection (4)* of section 71) to grant a person a conditional undertaking that any information that individual provides will not be used in any criminal proceedings, or proceedings under Part 5 of the Proceeds of Crime Act 2002, against that person in England and Wales or Northern Ireland. The notice containing the undertaking must be in writing and specify the circumstances in which the information provided will not be used against that person. The notice will normally include conditions, breach of which would lead to the undertaking being revoked.

Section 73: Assistance by defendant: reduction in sentence

174. This section provides that the Crown Court, when sentencing defendants who plead guilty in proceedings before that court and who have entered into a written agreement to provide assistance in any investigation or prosecution, can take account of the nature and extent of that assistance. *Subsection (3)* requires the court in passing a lower sentence to set out what the sentence would otherwise have been, unless (*subsection (4)*) it is in the public interest not to do so (in which case the court must provide a written notice of what the sentence would have been to the prosecutor and the defendant). *Subsection (5)* provides that this section applies to offences for which there is a minimum sentence and also to sentences fixed by law in determining the minimum period of imprisonment that a person must serve. The intention is that court can in exceptional circumstances exercise its power under *subsection (2)* to reduce a person's sentence or minimum period of imprisonment, as the case maybe, to reflect the assistance provided or offered. *Subsection (6)* provides that the court's decision (or not) to take into account the assistance provided or offered by a person does not affect any other power it may have when determining that person's sentence or minimum term for imprisonment. *Subsection (7)* disapplies the specified provisions, which would otherwise require the court to explain the reasons for passing its sentence on a person, where the court has decided (under *subsection (4)*) that it is not in the public interest to make such an explanation.

Section 74: Assistance by defendant: review of sentence

175. This section provides that where a person is still serving a sentence imposed by the Crown Court and one of the conditions in *subsection (2)* applies, a specified prosecutor may refer the person's sentence back to the court for review (where possible to the original sentencing judge), where he considers it is in the interests of justice to do so. The *subsection (2)* conditions are that the defendant received a reduced sentence on

the basis of an agreement to assist, but then knowingly failed to give that assistance; or the defendant gives or agrees to give assistance after they have been sentenced. *Subsection (5)* gives the court a power to substitute a greater sentence where it considers the person has failed to assist (not exceeding the sentence it could have passed but for the agreement). However, where a person has provided assistance or offered to assist, *subsection (6)* gives the court a power to take that into account and to reduce the individual's sentence accordingly. *Subsections (8)* and *(9)* provide that normal avenues of appeal against sentence apply. *Subsection (13)* ensures that where a person was convicted of an offence for which the sentence was fixed by law, they must have pleaded guilty if their sentence is to be referred back to court for a review under this section.

Section 75: Proceedings under section 74: exclusion of public

176. This section provides that a court in dealing with a defendant under section 74 can exclude people from the court or impose reporting restrictions, but only to the extent that it is necessary to protect the safety of any person and it is in the interests of justice. The court cannot exclude court staff, parties to the proceedings (or their legal representatives) or others directly concerned with the proceedings.

Chapter 3: Financial reporting orders

177. *Sections 76 to 81* provide for a new ancillary order, available to courts at the point of sentence. The order will require offenders convicted of specified fraud and organised crime lifestyle offences to make such reports of their income and assets as the court sets out in the order.

Section 76: Financial reporting orders: making

178. This section provides that courts can make a financial reporting order in respect of an offender convicted of an offence set out in *subsection (3)*, where it considers the risk of the offender committing similar offences is sufficiently high.
179. The offences set out in *subsection (3)* are specified deception offences in the Theft Acts 1968 and 1978 or an organised crime lifestyle offence specified in Schedule 2 to the Proceeds of Crime Act 2002. *Subsection (4)* confers a power on the Home Secretary to amend that list by order subject to the affirmative resolution procedure.
180. *Subsections (6)* and *(7)* provide for a maximum duration of the order of 5 years when made in the magistrates' court and 15 years when made in any higher court (20 years for those sentenced to life imprisonment).

Section 77: Financial reporting orders: making in Scotland

181. This section makes similar provision to section 76 in respect of Scotland.
182. The offences set out in *subsection (3)* are at common law, the offence of fraud and lifestyle offences under Schedule 4 to the Proceeds of Crime Act 2002. *Subsection (4)* confers a power on the Scottish Ministers to amend that list of offences by order subject to affirmative resolution procedure in the Scottish Parliament.
183. *Subsections (6)* and *(7)* provide for a maximum duration of the order of 5 years when made by a Sheriff and 15 years when made in the High Court of Justiciary (20 years for those sentenced to life imprisonment).

Section 78: Financial reporting orders: making in Northern Ireland

184. This section makes similar provision to section 76 in respect of Northern Ireland. The offences set out in *subsection (3)* are the direct Northern Ireland equivalents of those in section 76(3).

185. *Subsections (5) and (6)* provide for a maximum duration of the order of 5 years when made by (or on appeal from) a magistrates' court and 15 years when made in a higher court (20 years for those sentenced to life imprisonment).

Section 79: Financial reporting orders: effect

186. This section sets out the requirements of the order and creates an offence of failing to comply with the order. In making the order, the court will specify: the duration of the order and the frequency of reports; what financial details and supporting documents should be in or accompany each report; and who the reports should be made to and the deadline for providing them (*subsections (1) to (8)*). *Subsection (9)* provides that in Scotland reports will be made to an appropriate person specified as such by order made by the Scottish Ministers. *Subsection (10)* creates a summary criminal offence, committed if the subject of the order fails to comply with any requirement of an order and punishable by a term of imprisonment of up to 51 weeks (12 months in Scotland, 6 months in Northern Ireland) and/or a fine not exceeding level 5 on the standard scale.

Section 80: Financial reporting orders: variation and revocation

187. This section makes provision for applications to the court to vary or revoke an order. An application may be made by either the subject of the order or the person to whom the reports are made.

Section 81: Financial reporting orders: verification and disclosure

188. This section makes provision for the person to whom reports will be made (the 'specified person') to disclose the contents of a report to other people (*subsection (2)*). Similarly, any person may disclose information to the specified person or a person to whom the specified person has disclosed a report (*subsection (3)*). Such disclosures may only be made, however, for the purposes of checking the accuracy of a report, discovering the true position, or preventing, detecting, investigating or prosecuting criminal offences (*subsections (4) and (5)*).

Chapter 4: Protection of witnesses and other persons

Section 82: Protection of persons involved in investigations or proceedings

189. *Section 82* makes provision for the protection of witnesses and certain other persons involved in investigations or legal proceedings. Arrangements for protection under section 82 may be made by protection providers (that is, the persons listed in *subsection (5)*). *Subsection (7)* ensures that other powers to provide protection are not affected. This means that persons who are not protection providers will still be able to provide protection to witnesses and others under their existing powers. It also means that protection providers may continue to use other powers. For example, if the only protection required is the provision of a security lock or a panic alarm, a protection provider may think it appropriate to use his existing powers rather than rely on section 82.
190. *Subsection (1)* allows a protection provider to make appropriate arrangements for protecting people. *Subsection (2)* allows the provider to vary or cancel these arrangements.
191. *Subsection (3)* requires a protection provider to make a record of arrangements made or cancelled specifically under these provisions. The effect of this will be to clarify whether protection is being provided under these provisions or whether it is being provided under other powers (see the comments about subsection (7) in paragraph 189 above).
192. *Subsection (4)* sets out the criteria which the protection provider must consider in deciding whether or not to provide protection.

These notes refer to the Serious Organised Crime and Police Act 2005 (c.15) which received Royal Assent on 7th April 2005

193. *Subsection (5)* lists the persons who are statutory protection providers for the purposes of the Chapter.
194. *Subsection (6)* enables the Secretary of State, following consultation with Scottish Ministers, to amend by order (subject to the affirmative procedure) the list in Schedule 5 of categories of people who may be eligible for protection.